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No. 02-435

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

STATE OF OHIO,
Petitioner,

-vs-

ANGEL M. TORR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

RON O'BRIEN
Prosecuting Attorney
Franklin County, Ohio
STEVEN L. TAYLOR
(Counsel of Record)
Asst. Pros. Attorney
373 South High St., 13th Floor
Columbus, Ohio 43215
614-462-3555

Counsel for Petitioner

13 pp

QUESTION PRESENTED FOR REVIEW

1. Whether an appellate court violates the standard of review for sufficiency of the evidence under ***Jackson v. Virginia***, 443 U.S. 307 (1979), when it finds that the evidence was sufficient to support the guilty verdict on one count but then proceeds to sustain an insufficient-evidence challenge to that count by relying on the trial court's findings regarding another count of the same indictment.

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Petitioner State of Ohio hereby makes the following reply in support of its petition for writ of certiorari.

ARGUMENT

The Ohio Court of Appeals violated the standard of review for sufficiency of the evidence as set forth in ***Jackson v. Virginia***, 443 U.S. 307 (1979), and as followed by the Ohio Supreme Court in ***State v. Jenks***, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). It found the evidence to be sufficient under the proper ***Jackson-Jenks*** standard, but then it proceeded to find the evidence "insufficient" because of a "specific finding" that the trial court had made in acquitting respondent under another count of the indictment.

The trial court's "specific finding" on another count should have played no role in the Ohio appellate court's sufficiency review, as the ***Jackson*** Court itself said, *see* ***Jackson***, 443 U.S. at 319 n. 13, and as further recognized in ***United States v. Powell***, 469 U.S. 57, 67 (1984).

A.

Respondent Torr's response is to largely ignore the error and instead argue that the Ohio appeals court could go beyond the limits of ***Jackson-Jenks*** sufficiency review. Respondent is arguing that ***Jackson*** establishes a floor of Due Process protection and that the Ohio appeals court was free to go beyond the ***Jackson-Jenks*** standard as a matter of Ohio law. (*See* Respondent's Brief, at 10)

Respondent fails to recognize a significant threshold problem with her argument. Under ***Michigan v. Long***, 463 U.S. 1032 (1983), when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court has jurisdiction to review the state-court decision. ***Id.*** at 1040.

Respondent here cites no "plain statement" that the Ohio appeals court was relying on state law grounds for its decision. Indeed, respondent cites *no* statement at all to support her "state law" interpretation.

B.

Respondent cannot cite any support for her "state law" approach because the Ohio appeals court purported to rely on the federal Due Process standard for sufficiency review. Respondent herself had cited ***Jackson*** three times in her appellate brief and invoked the federal standard in support of her claim of insufficient evidence. (*See* Brief of Defendant-Appellant, at 31-32) Respondent herself characterized the sufficiency issue as "an issue of constitutional dimension," citing ***In re Winship***, 397 U.S. 358 (1970), and then

discussing the federal standard and citing ***Jackson***. (*See* Brief of Defendant-Appellant, at 32) Respondent stated that "a conviction based on legally insufficient evidence constitutes a denial of due process." (***Id.*** at 31, quoting ***State v. Thompkins***, 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546 (1997)) Respondent had also cited the ***Jenks*** decision, which is the main Ohio case that directly follows the ***Jackson*** standard, and respondent even noted that ***Jenks*** followed ***Jackson***. (*See* Brief of Defendant-Appellant, at 32)

In its merit brief, petitioner Ohio also cited ***Jenks*** and quoted the Due Process-based sufficiency standard from ***Jenks***. (*See* Brief of Plaintiff-Appellee, at 21)

For its part, the Ohio appeals court set forth ***Jenks*** as the standard for its sufficiency review and cited the second paragraph of the syllabus in ***Jenks***, which was the part of ***Jenks*** that had expressly followed ***Jackson***. (Pet. Appx. at 31) The citation to ***Jenks*** shows that the Ohio appeals court was purporting to rest its decision primarily on the federal Due Process standard, since ***Jenks*** followed ***Jackson***. Notably, in at least twenty-nine cases since 1997, the Ohio Supreme Court has cited ***Jackson*** and ***Jenks*** together in setting forth the same sufficiency standard, with the Ohio Supreme Court oftentimes giving ***Jackson*** top billing. *See e.g.*, ***State v. Franklin***, 97 Ohio St.3d 1, at ¶ 56, ___ N.E.2d ___ (2002); ***State v. Jalowiec***, 91 Ohio St.3d 220, 228, 744 N.E.2d 163, 173 (2001); ***State v. Treesh***, 90 Ohio St.3d 460, 484, 739 N.E.2d 749, 774 (2000). These frequent twin citations confirm that ***Jackson*** and ***Jenks*** set forth the same Due Process sufficiency standard.

In all respects, then, the appellate court purported to rely on ***Jackson-Jenks*** standard as the basis for its action. It cited no other legal principle or legal authority for its action.

When petitioner Ohio sought reconsideration, the Ohio appeals court adhered to its "sufficiency" approach, despite Ohio's contention that sufficiency review did not allow reversal based on a "specific finding" on another count. The Ohio court said that its "specific finding" analysis "came fully within the third assignment of error raised by appellant, *which is that appellant's conviction was not supported by sufficient evidence*." (Pet. Appx. at 48; emphasis added)

In the final analysis, the sufficiency issue was briefed and decided under the ***Jackson*** sufficiency standard as directly followed by ***Jenks***. The Ohio appeals court thus was resting its decision primarily on the federal sufficiency standard. At a minimum, the Ohio appeals court's ruling was interwoven with federal law as pronounced in ***Jackson*** and followed in ***Jenks***. *See* ***Pennsylvania v. Labron***, 518 U.S. 938, 941 (1996) (state court's reliance on state cases involving federal law means state-court decision interwoven with federal law).

C.

Respondent errs in suggesting that the Ohio appeals court was relying on its "manifest weight" review under Ohio law. Respondent raised her manifest-weight argument in her *fourth* assignment of error. (Pet. Appx. at 30) The Ohio appeals court *overruled* that assignment of error. (***Id***. at 41, 45) The court therefore specifically eschewed any reliance on a manifest-weight approach, choosing instead to reverse on grounds of "insufficiency."

D.

While a state court has the undoubted authority to construe state constitutional law or state statutory law in a way

that provides greater protection to defendants than the federal Constitution, state courts have no discretion whatsoever to deviate from this Court's pronouncements on federal constitutional law when reviewing a federal constitutional claim. ***Arkansas v. Sullivan***, 532 U.S. 769, 772 (2001). Respondent raised a federal Due Process sufficiency claim under ***Jackson***, and as such the Ohio appeals court was bound to follow ***Jackson*** in addressing that claim.

As argued here and in the petition for writ of certiorari, the Ohio appeals court fundamentally refused or failed to follow ***Jackson***. That mistake warrants review.

E.

Respondent erroneously contends that "[n]othing in Jackson prohibits a reviewing court from looking at a trial court's specific findings when passing on a sufficiency of the evidence claim." (*See* Respondent's Brief, at 12) ***Jackson*** sets forth the standard for sufficiency review and that standard focuses on whether the evidence, when construed in the light most favorable to the prosecution, would have allowed *any* rational trier of fact to find the defendant guilty beyond a reasonable doubt. ***Jackson***, 443 U.S. at 319. The very statement of this standard shows that the focus is on the objective adequacy of the evidence in the mind of *any* rational factfinder. The focus is on how the rational factfinder *could* have determined the facts when the evidence is construed in the prosecution's favor. By definition, this objective analysis would not address how a particular factfinder subjectively determined the facts.

Jackson itself points this out in footnote 13: "The question whether the evidence is constitutionally sufficient is of course *wholly unrelated* to the question of how rationally

the verdict was actually reached." (Emphasis added) The ***Jackson*** sufficiency standard "does not require scrutiny of the reasoning process actually used by the factfinder – if known." ***Id.*** at 319 n. 13.

Even if ***Jackson*** was not clear enough, the decision in ***Powell*** settled the matter. In discussing sufficiency review, the ***Powell*** court noted that sufficiency review does not address purported inconsistencies in verdicts: "[Sufficiency] review should not be confused with the problems caused by inconsistent verdicts." ***Powell***, 469 U.S. at 67. Sufficiency review determines whether "the evidence adduced at trial could support *any* rational determination of guilt beyond a reasonable doubt." ***Id.*** (Emphasis added) Accordingly, sufficiency review occurs independently of how the factfinder determined the facts under another count: "This review should be independent of the jury's determination that evidence on another count was insufficient." ***Id.***

The Ohio appeals court had no business considering the trial court's "specific findings" on the involuntary manslaughter count in addressing sufficiency of the evidence for the felony child endangering count. In contending that "specific findings" could be considered, respondent underscores the need for this Court to accept review, so that this fundamental misconception of sufficiency review can be put to rest.

F.

Respondent also errs by contending that the decision of the Ohio appeals court was "correct." Respondent quotes a passage from the appellate court's decision denying reconsideration, but that very passage contains improper references to what the trial court "found" and to the "trial

court's findings of fact." (*See* Respondent's Brief, at 12) The Ohio appeals court had no business considering "findings" in addressing respondent's sufficiency claim.

Beyond that problem, the passage is wrong. The "specific finding" that supposedly warranted reducing felony child endangering to misdemeanor child endangering was the finding that respondent had not proximately caused her son's death. (Pet. Appx. at 54) But that finding was not based on a supposed distinction between "reckless" and "negligent" acts, and the appeals court's effort to say that the trial court had drawn such a distinction was an invention of the appeals court. In any event, the "distinction" was irrelevant because the Ohio appeals court had already found that the evidence was sufficient for felony child endangering.

G.

Respondent repeats the same errors by contending that resolution of her sufficiency claim "is less a matter of applying Jackson and controlling Ohio case law than looking to the specific elements of the crime, the controlling culpable mental state, and holding the trial judge to her word." (*See* Respondent's Brief, at 13) One wonders how a sufficiency claim can be "less a matter of applying Jackson," which is the leading case on the standard for sufficiency review. Respondent herself had specifically relied on ***Jackson***.

Respondent seems to concede what the appeals court thought it was doing. Respondent asserts that the appeals court was "holding the trial judge to her word." This, again, is contrary to the ***Jackson*** sufficiency standard. Respondent also overlooks the fact that the trial judge actually found respondent *guilty as charged* of felony child endangering. If the Ohio appeals court had been holding the trial judge to her

word, it would have upheld the trial judge's guilty verdict.

H.

Respondent misstates things when she says that "[i]t doesn't matter whether or not the Court of Appeals believed the proof in support of the serious physical harm element of felony child endangering was supported by the evidence. The trial court specifically found that the necessary link did not exist." (*See* Respondent's Brief, at 13-14) This, again, is not true. In finding lack of proximate cause of death for purposes of involuntary manslaughter, the trial court was *not* saying that there was a lack of proof of resulting serious physical harm for purposes of felony child endangering. As the Ohio appeals court itself acknowledged, there are differences between these two kinds of causation. (Pet. Appx. at 47-48) The lack of the first therefore did not translate into the lack of the second.

I.

Finally, respondent refers to "inconsistent verdicts." Quoting ***Powell***, respondent suggests that appellate courts can use sufficiency review to "remedy" inconsistent verdicts. (*See* Respondent's Brief, at 14) Respondent further suggests that the Ohio appeals court could have sought to remedy an inconsistency as a matter of state law. (***Id.*** at 16)

Respondent's quotation of ***Powell*** is puzzling, inasmuch as ***Powell*** expressly cautioned against "confus[ing]" sufficiency review with the problem of inconsistent verdicts. ***Powell***, 469 U.S. at 67. Indeed, ***Powell*** expressly rejected the argument therein that sufficiency review should be used as a basis to remedy an inconsistency in verdicts. ***Id.*** at 68.

Although respondent quotes a passage from ***Powell***,

that passage merely recognizes that defendants are adequately protected from jury irrationality by sufficiency review. The ***Powell*** passage is not a license for a court to turn sufficiency review into a means of remedying inconsistencies in verdicts.

As for respondent's contention that the Ohio appeals court could have remedied verdict inconsistencies, respondent concedes that the Ohio court expressly eschewed reliance on a supposed inconsistency. (*See* Respondent's Brief, at 16; Pet. Appx. at 47) Moreover, the Ohio court even recognized that there were differences between the degrees of causation needed for the two counts. (***Id.*** at 47-48) The verdicts are reconcilable and consistent.

CONCLUSION

In light of the foregoing, petitioner State of Ohio respectfully requests that this Court grant the petition for writ of certiorari, so that this Court can correct the appellate court's fundamentally mistaken or defiant views on the federal question of sufficiency of the evidence.

Respectfully submitted,

RON O'BRIEN
Prosecuting Attorney
STEVEN L. TAYLOR
(Counsel of Record)
Asst. Pros. Attorney

Counsel for Petitioner

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